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" 2 " no.
Miller with Op. Sep

SUPREME COURT OF THE UNITED STATES.

No. ~~254~~. 152.

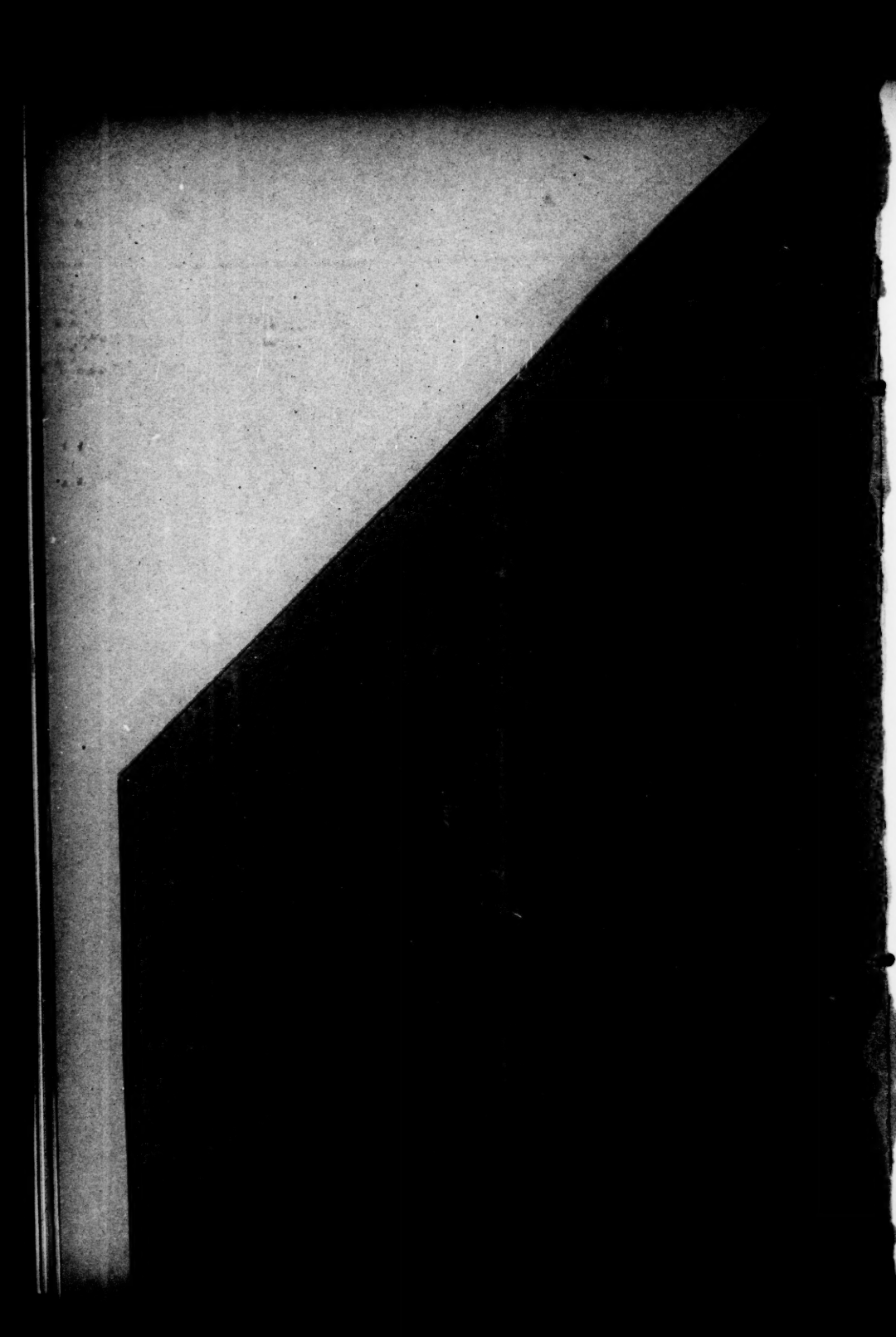
THE UNITED STATES, PLAINTIFFS,

vs.

SUSAN MURPHY, MARY MITCHELL, AND MARY GRAY.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

GOVERNMENT PRINTING OFFICE.



1 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof, now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this seventh day of June, in the year of our Lord one thou-
[SEAL.] sand eight hundred and sixty-four, and of the independence of the said United States the eighty-eighth.

A. SCOTT SLOAN, *Clerk.*

2 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the ninth circuit and district of Wisconsin, begun and held according to law, on the third Monday (being the eighteenth day) of April, A. D. 1864, at the city of Milwaukee, in said district of Wisconsin.

Present and presiding, the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, assigned to said circuit, and the Honorable Andrew G. Miller, district judge.

On the tenth day of said term, to wit, on the 28th day of April, A. D. 1864, the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA
vs.
SUSAN MURPHY, MARY MITCHELL, AND MARY GRAY } Criminal indictment.

Be it remembered, that heretofore, to wit, on the tenth day of July, A. D. 1863, a bill of indictment was found against the above-named defendants, which is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America, held in and for the said district, at Milwaukee, on the first Monday of July, in the year of our Lord one thousand eight hundred and sixty-three, the jurors of the United States of America, for the district of Wisconsin, now here
3 in court, duly empanneled and sworn, on their oath present that heretofore, to wit, on or about the first day of June, in the year of our Lord one thousand eight hundred and sixty-three, at Milwaukee, in said district, Susan Murphy, Mary Mitchell, and Mary Gray, married women, and late of Milwaukee, in said district, did assault and obstruct one Patrick Finey, an enrolling officer for the sub-district comprising the third ward of Milwaukee aforesaid, duly appointed as such by the board of enrollment in the first congressional district of the State of Wisconsin, organized under and by virtue of an act of the Congress of the United States of America approved on the third day of March, in said year, entitled "An act for enrolling and calling out the national forces, and for other purposes," in making a draft of men enrolled under said act into the service of the United States, and in the performance of service in relation thereto, to wit, in making an enrollment of persons subject to do military duty in said district, for said draft; and then

and there did violently strike and beat the said Patrick Finey, enrolling officer as aforesaid, by means whereof the said Patrick Finey was grievously hurt and wounded; and said Susan Murphy, Mary Mitchell, and Mary Gray did counsel certain persons, to the jurors aforesaid unknown, to assault and obstruct the said Patrick Finey, enrolling officer as aforesaid, against the peace and dignity of the United States, and contrary to the form of the statute in such case made and provided.

JNO. B. D. COGSWELL, *U. S. Att'y. Wis.*

Which said bill of indictment has endorsed thereon by the United
4 States attorney and the foreman of the grand jury, as follows, to wit:

"Indictment for assaulting and obstructing U. S. enrolling officer in the performance of services in relation to a draft.

"JNO. B. D. COGSWELL, *U. S. Att'y, Wis.*

"A true bill.

"A. M. THOMSON, *Foreman.*"

And afterwards, on the twenty-second day of July, A. D. 1863, came the United States attorney, and, on his motion, process is awarded on said bill of indictment; and on the same day process issued, in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the marshal of the district of Wisconsin, greeting:

You are hereby commanded to take Susan Murphy, Mary Mitchell, and Mary Gray, and them safely keep, so that you have them before the [SEAL.] circuit court of the United States of America for the district of Wisconsin, in the ninth circuit, at the United States court-room, in the city of Milwaukee, forthwith, then and there to answer unto an indictment for assaulting and obstructing U. S. enrolling officer in performance of services in relation to draft; and of this writ make due return.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States, at the city of Milwaukee, in said district, this twenty-second day of July, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-eighth.

J. M. MILLER, *Clerk.*

JNO. B. D. COGSWELL, *U. S. Dist. Attorney.*

And afterwards, on the sixth day of October, 1863, came the U. S.
5 district attorney, and, on his motion, it is ordered by the court that this indictment be certified to the district court of the United States for the district of Wisconsin.

And afterwards, to wit, on the 18th day of April, 1864, this cause was certified back from the district court, as follows, to wit:

UNITED STATES OF AMERICA,
District of Wisconsin, ss:

At a stated term of the district court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district of Wisconsin, on the first Monday (being the fourth day) of January, A. D. 1864.

Present: The Honorable Andrew G. Miller, judge of said court, presiding.

On the fifteenth day of said term, to wit, on the fourth day of April, A. D. 1864, the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA
vs.
SUSAN MURPHY, MARY MITCHELL, AND MARY GRAY. } Criminal indictment.

This day came the defendants, by their counsel, Messrs. Martin & Hofer, and filed their demurrer; and came the United States district attorney, and on his motion, it is ordered by the court, that this indictment be certified to the circuit court of the United States for the district of Wisconsin. And the demurrer filed by the defendants is in the words and figures following, to wit:

District court of the United States for the district of Wisconsin.

THE UNITED STATES
vs.
SUSAN MURPHY, MARY MITCHELL, AND MARY GRAY.

And now come the above-named defendants in their own proper person, and, having heard read the above indictment, do say that the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that they are not bound by the law of the land to answer the same; and this they are ready to verify. Wherefore, for want of a sufficient indictment in that behalf, the defendants pray the judgment of this court, and that by this court here they may be dismissed and discharged from the said premises in the said indictment specified.

MARTIN & HOFER,
Att'ys for the Def'dts.

And afterwards, on the 25th day of April, 1864, came the United States, attorney and filed a joinder in demurrer in the words following, to wit:

Circuit court of the United States, district of Wisconsin.

THE UNITED STATES OF AMERICA
vs.
SUSAN MURPHY, MARY MITCHELL, AND MARY GRAY.

And John B. D. Cogswell, who prosecutes for the United States in this behalf, saith that the said indictment and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said defendants to answer the same, and is ready to verify and prove the same as the court here shall direct and award. Wherefore, he prays judgment against said defendants, and that they may be convicted of the premises in the indictment specified.

JNO. B. D. COGSWELL,
U. S. Att'y, Wisconsin Dist.

And afterwards, on the 27th day of April, 1864, on consideration of the demurrer of the defendants to this indictment, the judges of this court
7 were opposed in opinion thereon. Whereupon the United States attorney filed his motion for a certificate of opposition of opinion, &c., in the words and figures following:

U. S. circuit court, Wisconsin district.

THE UNITED STATES OF AMERICA
vs.
SUSAN MURPHY *et al.*

And now, on this 27th day of April, A. D. 1864, comes Jno. B. D. Cogswell,

attorney for the United States, and moves the court that the points upon which a disagreement of opinion between the judges has arisen in this cause may be stated under direction of the judges, and certified, under the seal of the court, to the Supreme Court.

JNO. B. D. COGSWELL.

And afterwards, on the 28th day of April, 1864, came the district attorney, Mr. Cogswell, and presented to the court a statement of the position of this cause, as follows:

The defendants were indicted under the 25th section of the act of March 3, 1863, commonly called the conscription act, page 735, 12 U. S. Stat. at Large. The indictment charged an assault and obstruction of one Patrick Finey, an enrolling officer, in making a draft of men under said act, and in the performance of services in relation thereto, to wit, in making an enrollment of persons subject to do military duty for said draft. The indictment was found in this court at the July term, 1863, and at the November term was remitted to the next term of the district court for the Wisconsin
8 district. At the January term, A. D. 1864, of the district court it was remitted to the next term of the circuit court for the Wisconsin district, under section 2, act Aug. 8, 1840, 9 Stat. at Large, p. 72. The defendants demurred to the indictment as insufficient in law. The United States joined in demurrer. This cause coming on to be argued at this term, it occurred as a question, whether the court had jurisdiction, the indictment having been found in this court, remitted to the district court, and by the district court again remitted into this court. On which question the opinions of the judges were opposed.

It also occurred as a question, whether the offence charged in the indictment, namely, an assault and obstruction of an officer in making an enrollment of men for military duty, is embraced in the 25th section of the act aforesaid, as an assault or obstruction of an officer in making the draft, or in the performance of services in relation thereto. On which question the opinions of the judges were opposed.

Whereupon, on motion of the attorney for the United States, that the points on which the disagreement hath happened may, during the time, be stated under the direction of the judges, and certified, under the seal of the court, to the Supreme Court, to be finally decided, it is ordered that the foregoing state of the pleadings and statement of the position of the case, which is made under the direction of the judges, be certified according to the request of the attorney for the United States and the law in that case made and provided.

Filed June 10, 1864.

In the Supreme Court of the United States.

DECEMBER TERM, 1865.

THE UNITED STATES
vs.
SUSAN MURPHY *et al.*
No. 152.

CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT FOR THE DISTRICT OF WISCONSIN.

BRIEF FOR THE UNITED STATES.

JAMES SPEED,
Attorney General.
J. HUBLEY ASHTON,
Assistant Attorney General.

1099

In the Supreme Court of the United States.

DECEMBER TERM, 1865.

THE UNITED STATES
vs.
SUSAN MURPHY, MARY MITCHELL and MARY GRAY. } No. 152.

This is a criminal case, certified from the circuit court of the United States for the district of Wisconsin, upon a division or opinion of the judges of that court.

The defendants were indicted under the 25th section of the act of Congress, of March 3, 1863, commonly called the "conscription act," (12 Stat. at Large, 735,) which provides "that if any person shall resist any draft of men enrolled under this act into the service of the United States, or shall counsel, of aid any person to resist any such draft, or shall *assault or obstruct any officer in making such draft, or in the performance of any service in relation thereto, or shall counsel any person to assault or obstruct any such officer*, such person shall be subject to summary arrest by the provost marshal, and shall be forthwith delivered to the civil authorities, and upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both of said punishments."

The specific offences charged in the indictment were, *first* assaulting and obstructing one Patrick Finey, a sub-district enrolling officer, in making an enrolment of persons subject to do military duty; and, *second*, counselling certain persons to assault and obstruct the said enrolling officer. (Record, p. 1.)

The indictment was found, July 10, 1863, by a grand jury of the circuit court for the district of Wisconsin.

On October 6, 1863, the circuit court, on motion of the district attorney, remitted the indictment to the district court, (Rec. p. 2,) in which court the defendants filed a general demurrer to the indictment. On April 4, 1864, the district court, on motion of the United States attorney, remitted the indictment to the circuit court. (Rec. p. 3.) Afterwards, in the circuit court, the United States, by their attorney, joined in demurrer. (Rec., p. 3.)

The cause coming on to be argued, the opinions of the judges of the circuit court were opposed on the following questions:

1st. Whether the court had jurisdiction, the indictment having been found in the circuit court, remitted to the district court, and by the district court again remitted into this court.

2d. Whether the offence charged in the indictment, namely, an assault and obstruction of an officer in making an enrolment of men for military duty, is embraced in the 25th section of the act of 1863, as an assault or obstruction of an officer in making the draft, or in the performance of services in relation thereto.

ARGUMENT.

The foregoing points are now presented for the determination of this court. We will consider them briefly in their order.

I. *Question of jurisdiction.*

There can be no doubt, we think, that the circuit court had full and complete jurisdiction of the case. The question must, however, be solved by the construction which the court may place on the provisions of the 2d section of the act of August 8, 1864, authorizing the remission of indictments in criminal cases. (9 Stat. at Large, 72; Brightley, 223, pl. 114.) This statute provides that, "whenever the district attorney shall deem it necessary, it shall be lawful for any circuit court in ses-

sion, by order entered on its minutes, to remit to the next term or session of the district court of the same district any indictment pending in the said circuit court, when the offence or offences therein charged may be cognizable by the said district court; and in like manner it shall be lawful for any district court to remit to the next term or session of the circuit court of the same district any indictment pending in the said district court; and such remission shall carry with it all recognizances, processes and pleadings pending in the case in the court from which the remission is made, *and the court to which such remission is made shall, after the order of remission is filed therein, act and proceed in the case as if the indictment and all other proceedings in the same had been originated in said court.*"

The plain and palpable effect of this statute is to confer upon the district court, where an indictment, charging an offence of which the district court has also cognizance, is found in the circuit court, and that indictment, by order of the circuit court, is remitted to the district court, the *same* power and jurisdiction over and in the case as it would have had if the indictment had been originally found in the district court. The district court in such a case, we contend, may either hear and determine the cause, or certify it, on motion of the district attorney, to the circuit court for determination, in precisely the same way and with precisely the same effect as if the indictment had been found by its own grand jury The authority of the circuit court, under the statute, to remit indictments, is confined to indictments charging offences which are cognizable by the district court; and, in the present case, there is no question that both courts had jurisdiction of the offence charged in the indictment. But when such an indictment is remitted to that court, it has power, in the words of

the statute, to "*act* and *proceed* in the case *as if* the indictment and all other proceedings in the same had been originated in said (district) court." The jurisdiction and power of the court to which the remission is made are thus not confined to the hearing and decision of the case remitted. Its power embraces not simply the discharge of those judicial functions and duties which may be taken to be described and indicated by the term "*proceed*," one of the terms employed in the statutes; but also whatever may be regarded as comprehended by the term "*act*," the other word used by the statute, in conferring upon the district court the power and jurisdiction which it is entitled to exercise in a case remitted regularly to it by the circuit court. The district court has not only authority to "PROCEED" in such a case, but also to "ACT" in that case "AS IF THE INDICTMENT AND ALL OTHER PROCEEDINGS IN THE SAME HAD BEEN ORIGINATED IN SAID COURT." No exception is made in the statute of any power or authority exercisable by the court in cases that originated with it, which it may *not* exercise in cases of which it acquires jurisdiction by remission. No limitation *whatever* is imposed by the act upon its jurisdiction in that class of cases. The grant of jurisdiction is couched in the broadest, the most general, and the most comprehensive terms. The district court has authority to *act* and *proceed* in remitted cases in the same way as it might lawfully have acted and proceeded in those cases if they had originated in that court.

The power of the district court, in cases of which it has obtained jurisdiction by remission of indictments from the circuit court, is identical, we contend, with its power in those cases of which it acquired jurisdiction through the action of its own grand jury. This is our major premise. If that proposition be conceded, under the words of the statute, the minor

premise of the argument, that in every case of an indictment found in the district court, the court may exercise the power of remitting the indictment to the circuit court, is too clear to be doubted. The words of the statute are, that "it shall be lawful for any district court to remit to the next term or session of the circuit court of the same district any indictment pending in the said district court."

The conclusion is, inasmuch as the district court may lawfully exercise, under the statute, the same jurisdiction and power in remitted as in original cases, and inasmuch as one of the powers exercisable in all original cases is that of remitting the indictments to the circuit court, that power may be lawfully exercised by the district court in cases of which it acquired jurisdiction by remission from the circuit court.

We have contended—and the proposition is our major premise—that the concluding words of the second section of the act of 1846, which confer upon the district court its jurisdiction in cases of indictments remitted to it from the circuit court, when read, according to their natural import, do not confine the authority of the court to hearing and determining the cases, but extend it to whatever else may be lawfully done, in cases of original cognizance, by that court. We now observe that the construction and effect which we have given to the provision of the statute are in accord with the policy of the law in regard to the remission of indictments from the district to the superior court. It is only through the exercise of this power that difficult and important questions of law arising in criminal cases can be brought, through the agency of the law officer of the government, before the two judges of the circuit court, and finally before the Supreme Court in the event of disagreement between the circuit court judges. The interests of justice and right interpretation of laws require that in all criminal cases coming before

the district courts, whether by original institution or remission, some method should exist by which the district judges may be enabled to obtain the counsel and opinion of the circuit judges, and in difficult cases, where real differences of opinion exist between the respective judges, the judgments of the highest court of the nation. Congress, in providing for the remission of cases to the circuit courts and for certificates of division of opinion, evidently intended to prevent what might otherwise prove to be a serious mischief. Mr. Justice CURTIS held that the law providing for the remission of indictments, by and on the independent action of the district court, in cases involving difficult and important questions of law, was to be construed liberally, and in favor of the exercise of that power by the court after issue joined between the parties, and not merely on the presentation of the indictments, on the ground of the beneficent and beneficial character of the power under the existing system of criminal procedure. (U. S. *vs.* Morris, 1 Curtis C. C. R., 31.) And why should not the court exercise this power in one class of cases as well as in the other? Why should a district judge, when it is made apparent to the attorney of the United States that difficult or important questions will ultimately arise and require decision in a case, be restrained from ordering its remission to the higher court; any more in a case coming before him by remission than in one originally instituted in his court? The present case presents a test of the principle. When this indictment was sent to the district court, the circuit court was probably not aware that the question of the liability of the defendants to the prosecution was one of grave doubt and much difficulty, as certainly it was not aware judicially that the question was intended to be directly raised by demurrer to the indictment. As soon as the indictment reached the circuit court, the demurrer was filed, and it became apparent that a serious ques-

tion of construction, under the conscription act, was presented. Then the case was ordered, on motion of the district attorney, to be removed into the circuit court, by whose division of opinion the question, under the statute on which the indictment is founded, is now before this court. Unless this court sustain the action of the district court and affirm its authority, on motion of the district attorney to remove a case, similarly situated, to the circuit court, the defendants in all such cases will be deprived of the security of the judgment of this high tribunal, and the country of the benefit which flows from uniformity of decision in criminal causes, induced by the authority which the opinions of this court carry with them into all the judicial districts of the Union.

If the court should sustain the views now stated, and hold that it was competent for the district court, under the statute, to remit this indictment, after it had acquired jurisdiction of it by remission, back to the circuit court, the question of the jurisdiction of the circuit court in the case must be determined in favor of the prosecution, and such determination certified to the circuit court.

II. *The construction of the statute.*

The second question certified for the opinion of the court is, whether an indictment will lie, under the 25th section of the "conscription act," for assaulting and obstructing an enrolling officer in the performance of his duty. The liability of a party to answer for such an act depends upon the point, whether an enrolling officer, engaged in the discharge of his statutory duty, can be said to be, within the meaning of the law, in the performance of a service in relation to a draft of men enrolled under the statute. The offence first described in the 25th section, is that of resisting any draft of men en-

rolled under the act into the service of the United States. It then defines the offence of assaulting or obstructing any officer in making *such* draft, *or in the performance of any service in relation thereto.* The present indictment alleges that the defendants assaulted and obstructed an officer in making a draft of men enrolled under the act, and in the performance of a service in relation thereto, *in this*, that they did assault and obstruct an enrolling officer in making an enrolment of persons subject to do military duty for such draft.

The ground on which we ask the court to certify its opinion against the demurrer is, *that the enrolment of persons subject to military duty was a service having direct and immediate relation to any draft of men that could lawfully be made under the act of* 1863, *and an officer engaged in making the enrolment was thus engaged in the performance of a service in relation to a draft of men enrolled under that act.*

No draft whatever could be made under the act until the completion of the enrolment directed to be made, and every draft was to be directly based upon the previous enrolment. The statute, after designating those who should constitute and be enrolled as the national forces, directed, in the third section, that those persons should be divided into two classes. It then proceeded to organize the machinery of provost marshal general, provost marshals, boards of enrolment, enrolment districts, and sub-districts, by which the enrolment and draft were to be accomplished. The 9th section directed to be made an immediate enrolment of all persons subject to military duty in the various districts, which persons, it was provided in the 11th section, were liable, "for two years after the first day of July succeeding the enrolment, to be called into the military service." The method of calling them into the service was the draft. The persons thus enrolled were those from whom the required number of the national forces were

to be taken by draft, whenever the President might deem it necessary to call out any of those forces. (See 12 Stat. at Large, pp. 732, 733)

No draft thus could be made without or before the enrolment. Every draft was to be of the persons previously enrolled. An officer engaged in the service of enrolling the national forces was in the performance of a service immediately relative to any and every future draft competent to be made under the statute. Except through the agency of the enrolling officers in perfecting the enrolment, no draft was possible. Before the enrolment, a draft could not be made at all. After the enrolment, it could only be made from the persons whose names were found on the enrolment lists.

We contend, therefore, that the enrolment was strictly a service "*in relation*" to a "*draft of men*" enrolled under the statute of 1863, and while engaged in making the enrolment the officer was, within the meaning of law, engaged in the performance of a service "*in relation*" to "such draft."

The experience of the country subsequent to the passage of this act, and during the time it was enforced, shows that the greatest dangers and impediments to its due and efficient execution sprung from the resistance and opposition encountered everywhere by the enrolling officers. In nearly every State and district the enrolment was attended by breaches of the peace and assaults, and in many places by scenes of bloodshed whenever the officers appeared. It was with the greatest difficulty and with imminent personal peril to the officers that the enrolment in some districts was accomplished. While these facts and experiences cannot, of course, warrant the judiciary in giving a construction to the statute which is not fairly supported by the language of the legislature, yet they are, nevertheless, entitled to consideration

in determining the legislative intention in enacting the penal provision of the 25th section; for it is fair to presume that Congress anticipated to some extent, and in a measure foresaw, what we know actually occurred, and designed, in framing this law, to embrace in its provisions all interferences, within the designation of assaults or obstructions, to officers appointed to perform any services necessary to be performed in order to effect the drafts intended to be made.

We contend that the court should, on both the points discussed, certify to the circuit court an opinion in conformity with the views presented.

JAMES SPEED,
Attorney General.
J. HUBLEY ASHTON,
Assistant Attorney General.